SUPREME COURT, U. S.

DEC 20 1968

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968

No. 862

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

PAUL M. GILLESPIE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRELIMINARY STATEMENT

C. C. Peyton, Superintendent of the Virginia State Penitentiary prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit of August 22, 1968, in the case of Paul M. Gillespie v. C. C. Peyton, Superintendent of the Virginia State Penitentiary. On September 13, 1968, an order was entered in the United States Court of Appeals for the Fourth Circuit staying its mandate for a period of ninety days from August 22, 1968. On December 5, 1968, the Chief Justice granted the Superintendent an extension of time to and including December 20, 1968, to file his petition for writ of certiorari.

OPINIONS BELOW

There was no opinion of the Circuit Court of the City of Staunton. The Supreme Court of Appeals of Virginia declined to grant a writ of error to the judgment of the Circuit Court of the City of Staunton of December 14, 1964, on October 14, 1965, but did not file an opinion in connection with the same. This Court denied a petition for writ of certiorari on June 20, 1966, and a petition for a rehearing was dismissed on October 10, 1966.

The opinion of the United States District Court for the Western District of Virginia in this case, *Gillespie* v. *Peyton,* is found at 266 F. Supp. 11 (1967).

The opinion of the court below is reported at 399 F. 2d 683 (4th Cir., 1968). Copies of the foregoing opinions will be found in the appendix to this brief.

THE JUDGMENT

The judgment of the court below was entered on August 22, 1968 (*Gillespie* v. *Peyton,* 399 F. 2d 683 (4th Cir., 1968)).

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in the premises is grounded upon the provisions of Section 1254(1), Title 28 U.S.C.

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit Err in Holding That the Confession of Paul M. Gillespie Was Improperly Admitted Into Evidence?

STATEMENT OF THE CASE

On or about February 20, 1963, Virginia Parkins was raped and murdered in the City of Staunton, Virginia. On or about September 7, 1963, Anna P. Dutton was assaulted

in Augusta County, Virginia. Paul M. Gillespie, hereinafter referred to as the prisoner, was arrested in Richlands, Virginia, in connection with the assault charge on September 16, 1963. Richlands, Virginia, is located in Tazewell County, and the Commonwealth's Attorney of Tazewell County was present at the time of the prisoner's arrest. The arrest was made by Sheriff John E. Kent of Augusta County, Virginia. The City of Staunton, Virginia, is surrounded by Augusta County. Sheriff Kent immediately informed the prisoner that he did not have to make any statement and that any statement that he made would probably be used in court against him. In addition, the Commonwealth's Attorney for Tazewell County advised the prisoner that he did not have to make any statement and advised him in some detail as to his rights (Tr. 29, 179). Sheriff Kent inquired of the prisoner as to his address in Staunton. The prisoner omitted his previous address of 123 North Madison Street. Sheriff Kent inquired as to why the prisoner had omitted this address, at which point the prisoner replied, "Don't try to pin that murder on me." (Tr. 181).

The prisoner was placed in the Jail of the City of Staunton on September 17, 1963. On September 19, 1963, Mrs. Stanley visited the prisoner (Tr. 187). On September 23 or September 24, the prisoner was visited by his brother and sister (Tr. 186).

A discussion concerning counsel between the prisoner and his brother and sister was overheard by Sheriff Kent, and there was a reference made to a Mr. Stanley, who was somehow related to Mrs. Stanley, the visitor. Philip L. Stanley, who was a practicing attorney at the time of the discussion, is apparently the Mr. Stanley to which reference was made. This Mr. Stanley was a relative of Mrs. Stanley, who was a frequent visitor of the prisoner.

On September 21, 1963, the prisoner was taken to the Parkins' home, and at that time the prisoner denied ever being in the pantry, which was behind the kitchen in the Parkins' home, the location at which the body of the deceased was found (Tr. 301). On that very day, after returning to jail, the prisoner refused to see Mrs. Stanley, who was waiting at the jail, nor would he accept some articles which Mrs. Stanley had brought to him (Tr. 302).

On September 27, 1963, Sergeant R. C. Gaunce, an experienced member of the Department of State Police, questioned the prisoner. He did so only after advising him that any statement which he might make could and probably would be used against him in a court of law. The prisoner advised Sergeant Gaunce that he wanted to see an attorney before he made a statement about the case. The questioning was immediately stopped until approximately nine hours later. At this time the prisoner again advised Sergeant Gaunce that he would like to talk to an attorney. Sergeant Gaunce mentioned most of the names of Staunton attorneys to the prisoner, and the prisoner replied that he did not know any of the attorneys mentioned. Although there appears to have been no actual request to contact an attorney made to Sergeant Gaunce, he nevertheless promised the prisoner that he would call an attorney (Tr. 373-375).

In response to a telephone call, Robert L. Rhea, an attorney in Staunton, went to the Police Station, where he was introduced to the prisoner, and he was advised that the prisoner was involved in the Parkins' case. At this point, Mr. Rhea pointed out that he had a conflict of interests because he had been appointed to prosecute certain cases in Staunton and would be unable to represent the prisoner in this matter.

It is important to note, however, that he advised the

prisoner that he was under no obligation to make a statement, that he could remain silent, and that any statement which he might make would probably be used against him in a court of law.

Mr. Rhea then left. Shortly thereafter, the prisoner gave a complete confession; the events of his heinous crime being described in detail.

For reasons not appearing to be clear, the court appointed Philip L. Stanley as attorney for the prisoner on October 10, 1963, and on the same day an order was entered committing the prisoner to Southwestern State Hospital at Marion, Virginia, for mental observation and evaluation. On December 2, 1963, Dr. Joseph R. Blalock, Superintendent of the Southwestern State Hospital, advised the court that the prisoner was not psychotic, nor had he been psychotic since his admission and that he was able to testify and assist in his own defense.

The court then directed that the prisoner be returned to Staunton to stand trial, and on December 18, 1963, the court was notified that the prisoner had employed counsel of his own choosing. Mr. Stanley was then relieved of his appointment. On January 6, 1964, a preliminary hearing was held, and the case was certified to the grand jury of the Circuit Court of the City of Staunton. On January 9, 1964, the prisoner was indicted by the grand jurors of the Circuit Court of the City of Staunton.

Because counsel representing the prisoner sought a writ of habeas corpus in the Supreme Court of Appeals of Virginia, the prisoner's trial did not commence until September 30, 1964. The prisoner was convicted and sentenced to serve a term of life imprisonment for murder.

It is of this sentence that he complains.

SUMMARY OF ARGUMENT

The Superintendent will demonstrate that the court below has not only misstated the facts in the case at bar, but has also applied this Court's decision in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), contrary to this Court's decision in *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

More succinctly stated, the Superintendent will show that the court below has not only ignored the evidence contained in the record, but has also required the Commonwealth to offer the prisoner counsel prior to interrogation at a time at which the same was not required.

ARGUMENT

The Court Erred in Holding That the Prisoner's Confession Was Improperly Admitted Into Evidence.

The sole question before this Court is the question of the admissibility of the confession of this convicted murderer. Let us turn first to the opinion of the court below. Judge Sobeloff in his opinion claims that in applying the teachings of this Court in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), the confession is inadmissible. First, Judge Sobeloff claims in his opinion that the prisoner was subjected to eleven days of continual police interrogation concerning his possible involvement in the unsolved murder of Virginia Parkins. This statement is not only unsupported by the record, but is refuted by the same. Moreover, Judge Sobeloff ignores the opinion of the learned District Judge wherein he pointed out that the prisoner received sympathetic care while in the Augusta County Jail in the City of Staunton. Let us, however, review carefully the record to determine whether or not Judge Sobeloff's statement has any basis in fact whatsoever.

The prisoner was arrested on September 16, 1963, in

Richlands, Virginia, which is located in Tazewell County. He was questioned for approximately two hours with regard to the Dutton offense. The only reference to the Parkins rape—murder was Sheriff Kent's question as to where the prisoner had lived in Staunton.

On the following day, September 17, 1963, the prisoner was taken to Wytheville, Virginia, where he was questioned for from two to two and a half hours. On the following day, September 18, 1963, he was not questioned at all. On September 19, 1963, no interrogation took place, although a conversation ensued between Mrs. Stanley, the prisoner, and Sheriff Kent for approximately one-half hour. On September 20, 21, 22, 23, 24, and 25, no questioning took place.

On September 26, Sergeant Gaunce interrogated the prisoner from approximately 9:00 p.m. until 3:00 a.m. Immediately upon the prisoner's statement that he would like to talk to an attorney, the questioning ceased. There was no questioning on September 27, 1963, because the prisoner said he would like to talk to an attorney. Mr. Rhea came and advised the prisoner of his right to remain silent and that he did not have to say anything whatsoever. Shortly thereafter, without any questioning taking place, the prisoner confessed.

In view of the foregoing summary of the evidence in the case at bar, it is manifest that Judge Sobeloff's claim that the prisoner was subjected to eleven days of continual police interrogation is, if it be put charitably, incorrect. More specifically, it can only be stated that the *opinion of the court below contains a gross misstatement of fact.*

The court does point out that the prisoner was advised of his right to remain silent. Having admitted this most important fact, it then proceeds in its opinion to gloss over the important advice given the prisoner.

The prisoner, having been advised of his right to remain silent by counsel, then confessed. The evidence does show that Mr. Rhea advised that a lawyer's fee would be a minimum of $500.00. There is no showing that the prisoner was indigent at this time. He was, however, provided with court-appointed counsel early in the prosecution, but shortly after his return from Southwestern State Hospital employed counsel who represented him throughout his prosecution in the courts of the Commonwealth, in the Supreme Court of Appeals of Virginia, and in this Court. For reasons not stated in the record, this attorney then failed to appear in the District Court and in the court below. He, however, now represents the prisoner in this proceeding.

The court below points out that the police failed to advise the prisoner of his right to a free court-appointed lawyer. This is true. It is submitted, however, that since this Court's decision in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), is not applicable herein (*Johnson* v. *New Jersey,* 384 U.S. 719 (1966)), that the same was unnecessary. The opinion of the court below is, therefore, premised upon a clear misstatement of law. Judge Sobeloff's misstatements of the facts are then buttressed by his clear misstatement of the law applicable to the case at bar. The prisoner was fully advised of his constitutional rights as they then existed under the decisions of this Court. Having been advised of his right to remain silent, he went ahead and made a confession. As hereinbefore pointed out, Judge Sobeloff's statement that the prisoner was subjected to eleven days of continual police interrogation *is not supported by the record.* Indeed, a careful review of the same shows that the prisoner was questioned for approximately nine to ten hours in a period of eleven days. Moreover, on the day upon which he confessed, he was not questioned at

all. The prisoner asked to talk with an attorney, and an attorney talked to him and advised him of his rights. He asked for permission to consult with counsel. This request was promptly honored, and all questioning ceased until such time as said conference took place.

Judge Sobeloff states in his opinion that the Commonwealth urged the court to accept the District Court's finding that the prisoner effectively waived his right to counsel. This, however, is not the question in the case at bar. *Escobedo,* of course, is limited to the facts as set forth therein. The case at bar does not involve a situation where counsel was seeking to confer with client. The facts in the case at bar, simply stated, are that the prisoner desired to talk with counsel. He did talk with counsel, and was advised of his rights. Immediately after having been advised of his rights, he made a confession. The prisoner was not mistreated, nor was he subjected to lengthly interrogation prior to his confession.

Judge Sobeloff in his opinion claims that the prisoner did not intelligently waive his right to counsel. This is clearly not the test in the case at bar. Here, the prisoner, apparently able to employ counsel, was advised by counsel as to his rights and then made a confession to a most heinous crime. It is quite clear that the opinion of the court below is not supported by the record from an evidentiary standpoint, nor has it correctly applied the law pertinent to this case.

It is of particular importance to note that this Court on June 20, 1966, subsequent to its decision in *Miranda,* denied a petition for a writ of certiorari, and thereafter on October 20, 1966, denied a petition for rehearing. While this Court has previously pointed out that denial of certiorari cannot be taken as an affirmance of the judgment below, it is quite clear that the Court has considered this

matter. This Court's action in dismissing the writ of certiorari is certainly entitled, however, to consideration. This Court, having reviewed the prisoner's conviction before should not now permit a lower Federal court to in effect reverse its decision.

CONCLUSION

A review of the record and the opinion of the court below clearly shows that the prisoner's confession was voluntary. The prisoner was fully advised as to his right to remain silent prior to the making of his confession. He was not subjected to continuous interrogation, nor even in Judge Sobeloff's view was he abused during the course of his incarceration. The effect of the decision of the court below is to void a life sentence imposed upon a rapist and murderer for a most heinous crime. The basic question presented is whether or not this decision of the United States Court of Appeals for the Fourth Circuit is to be allowed to stand to the detriment of the rights of the general public to enjoy life, liberty, and the pursuit of happiness in these United States.

For these reasons, it is respectfully submitted that the writ of certiorari should be granted and that the judgment of the court below should be reversed.

Respectfully submitted,

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Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Reno S. Harp, III, an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 20th day of December, 1968, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to Henry H. Tiffany, Esquire, Attorney at Law, P. O. Box 964, 116 S. Wayne Avenue, Waynesboro, Virginia 22980, counsel for the respondent herein.

RENO S. HARP, III
Assistant Attorney General

APPENDICES

APPENDIX I

Opinion and Judgment of The United States District Court for the Western District of Virginia, Harrisonburg Division, dated March 31, 1967

This matter comes to this court upon a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. §2241, by Paul M. Gillespie, a state prisoner, and is filed *in forma pauperis*.

In 1964 the petitioner, in two separate state trials, was found guilty of two unrelated felonies. In the first one on August 25, 1964, he was found guilty of malicious wounding in the Augusta County Circuit Court, Augusta County, and was sentenced to twenty years. He is presently serving the remainder of that sentence in the Virginia State Penitentiary. His second conviction came on December 14, 1964, when he was found guilty of first degree murder and sentenced to life imprisonment by the Circuit Court for the City of Staunton, Staunton, Virginia.

It is necessary to note at the outset that petitioner is attacking, via this petition, his life sentence for murder. The unrelated sentence for malicious wounding is not in contention.

We find the pertinent historical facts of this case to be as follows: On February 20, 1963, Miss Virginia Parkins was found murdered and raped in Staunton, Virginia. On September 7, 1963, one Anna P. Dutton was assaulted in Augusta County, Virginia. Then on September 16, 1963, petitioner was arrested in Richlands, Virginia, in connection with the assault of September 7, 1963. He was then taken to the Augusta County jail in Staunton after being questioned in Richlands, Virginia, where he was advised of his right to remain silent. He made, in Richlands, a statement which led the officers to suspect his connection with the February 20, 1963 murder. On September 20, 1963, petitioner was taken to the Parkins home in Staunton where the murder took place. Then on September 27, 1963,

he confessed to the murder of Miss Parkins. In October, 1963, after a lawyer was appointed for him, petitioner was committed to a state mental hospital for observation and was found mentally competent to stand trial. The preliminary hearing was held in January, 1964, and petitioner was indicted on February 18, 1964, for murder. Prior to this time, the petitioner had retained private counsel and the court appointed counsel had been allowed to withdraw from the case. His retained attorney filed an application in the Supreme Court of Appeals for a writ of habeas corpus and the case was continued on January 23, 1964, pending action on the petition by the Virginia high court. Subsequently on June 11, 1964, the writ was denied. In his first trial, on July 7, 1964, petitioner was found guilty in Augusta County of malicious wounding and was sentenced on August 25, 1964. The murder trial then took place from September 30 to October 2, 1964. The life sentence was imposed on December 14, 1964, after the court had been given a pre-sentence report. From this judgment an appeal was taken to the Supreme Court of Appeals which refused to grant a writ of error on October 14, 1965. From this denial the petitioner filed a petition for a writ of certiorari with the United States Supreme Court. This was denied on June 20, 1966 and a petition for a rehearing was denied on October 10, 1966. The petitioner now comes to this court alleging the same grounds for relief that he alleged in his petition for a writ of error to the Supreme Court of Appeals. In order to comply with the exhaustion of state remedies doctrine, it is not necessary for a petitioner to utilize state habeas corpus if he has once presented, and received a ruling upon, his allegations in a previous proceeding in the state's highest court. Therefore, since all the present allegations have once been ruled on by the Supreme Court of Appeals, petitioner has exhausted his

available state remedies in compliance with 28 U.S.C. §2254 as interpreted by *Fay* v. *Noia*, 372 U.S. 391 (1963).

The fact that the United States Supreme Court refused to grant the petitioner a writ of certiorari is of no significance to us. The Supreme Court said in *Brown* v. *Allen*, 344 U.S. 443 (1953) that its denial of certiorari to review a decision of a state supreme court which affirmed a criminal conviction of a lower state court should be given no weight by a federal district court in passing upon the same petitioner's application for a writ of habeas corpus.

However, before we can examine the merits of petitioner's contentions we must face the problem of whether we can properly entertain a habeas corpus petition from this particular petitioner. The problem has to do with the intermixed questions of what relief is available to the petitioner and whether petitioner is attacking the sentence he is now serving. According to the director of the Bureau of Records and Criminal Identification in Richmond, petitioner is presently serving a twenty year sentence for malicious wounding which was imposed in Augusta County Circuit Court on August 25, 1964, and which is entirely independent of the conviction which is under attack in the present petition. Thus the first part of the problem is whether there is any relief which we could give to the petitioner if we ruled in his favor. If not, then, the petition would raise a moot question. It is generally understood that "Habeas corpus is available only when a ruling in the petitioner's favor will result in his immediate release or will cause the restraints on his liberty to cease."[1] And as the Supreme Court said in *McNally* v. *Hill*, 293 U.S. 131, 136-7 (1934):

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[1] Sokol, R. P., *Federal Habeas Corpus*, p. 30 (1965).

> the only judicial relief authorized . . . [in a habeas corpus proceeding is] the discharge of the prisoner or his admission to bail, and that only if his detention were found to be unlawful.

It is obvious that a ruling in petitioner's favor on the present petition which challenges his murder conviction could not result in his immediate release or cause the present restraints on his liberty to cease because he would continue to serve the sentence for malicious wounding. Therefore we believe the petition should not be entertained because there is no relief available to petitioner on the murder conviction while he serves another previously rendered sentence.

The second part of the problem is whether the petitioner has standing to attack, by habeas corpus, a sentence which he is not yet serving. As stated above, the director's record indicates that petitioner is presently serving the malicious wounding sentence. Thus the implication would be that he has yet to begin serving the sentence for murder. And "a sentence which the prisoner has not begun to serve cannot be the cause of restraint which the [federal habeas corpus] statute makes the subject of inquiry." *McNally* v. *Hill, supra,* p. 138.

Although the judgment order of the Staunton City Corporation Court makes no mention of when service of the life sentence is to begin, it would appear to us that it was the intent of the trial court that the sentence begin to be served after completion of the twenty-year sentence. If this is true, this petition for a writ of habeas corpus is faulty, not only because relief is unavailable in this court, but it is also premature in that it attacks a sentence which petitioner has not begun to serve.

But notwithstanding the above considerations, and in

the alternative, we now undertake to consider the merits of the petitioner's allegations. We do this in order to give the petitioner a decision on his petition while the witnesses are still available, should they be needed, and while the record is still "warm".

We find that, upon examining the record, it will not be necessary to conduct a plenary hearing because the record leaves no controlling points in question.

The petitioner makes the following allegations:

(1) that he was denied the assistance of counsel during the period of interrogation prior to the confession;

(2) that his conviction was based primarily on a confession that was inadmissible because it was involuntary.

As to the first allegation, we note that the murder trial of petitioner took place from September 30, 1964, through October 2, 1964. Therefore the petitioner is entitled to have his confession measured by the standards laid down in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) because as was announced in *Johnson* v. *New Jersey,* 384 U.S. 719 (1966),

> . . . *Escobedo* is to be applied prospectively . . . [and] is available only to persons whose trials began after June 22, 1964, the date on which Escobedo was decided.

The same decision goes on to say that *Miranda* v. *Arizona,* 384 U. S. 436 (1966) is available only to persons whose trials began after June 13, 1966. Thus the *Escobedo* decision is the only one of the *Escobedo-Miranda* pair which is available to the petitioner. The *Escobedo* decision says, at pages 490-491, that the accused is denied assistance of

counsel and any statements he gives are therefore inadmissible,

> [where] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent. . . .

The record shows that the investigation had definitely focused on the petitioner and it was no longer a general inquiry into an unsolved crime. But the record shows further in unrebutted evidence, that before the petitioner gave his confession he was advised of his absolute constitutional right to remain silent. Additionally, when he requested the right to consult with an attorney, the questioning was stopped and a lawyer was called. In fact the record shows that this lawyer advised him that he had the absolute right to remain silent.

The fact that this lawyer was running for the office of Commonwealth's attorney and had prosecuted cases for the state in the past does not overcome the fact that the lawyer, when asked by the petitioner about the fee for representation, told him of his status and explained that because of his status he could not represent petitioner. He did, however, go on and advise petitioner of his right to remain silent. In light of these facts, petitioner chose to proceed several minutes later and give a confession. This, we hold, amounts to a clear waiver of any further right to consult with an attorney. Thus there is no merit in petitioner's first allegation.

Next, petitioner alleges that his conviction was based on a confession which was involuntary because the petitioner was kept in a cell by himself, deprived of all reading material, not allowed visiting privileges in accordance with the regular visitation schedule and was not allowed day room privileges.

The record shows that the petitioner was given sympathetic care while in the Augusta County jail. He was asked if he wanted to move into a cell block where there were other prisoners but he preferred to remain alone. He was not held *incommunicado* because the record shows that he had visitors. This fact overrides the fact that their visiting hours might have differed from the regular visiting hours from time to time. The record also shows that he was given reading material. In short, a reading of the lengthy record leaves us with the judgment that this petitioner gave a voluntary confession and that none of the alleged irregularities made it involuntary. Thus he is entitled to no relief on this second allegation.

It is therefore

ADJUDGED AND ORDERED

that the petition be dismissed and the writ denied.

The Clerk of this Court will send a copy of this opinion and judgment to counsel for the petitioner and to the respondent.

ENTER:

/s/ TED DALTON
U. S. Chief District Judge

APPENDIX II

Opinion of the United States Court of Appeals for the Fourth Circuit, filed August 22, 1968

SOBELOFF, Circuit Judge:

Paul M. Gillespie, a Virginia prisoner presently serving two unrelated sentences, one for murder and the other for malicious wounding, appeals from an order of the District Court denying his petition for a writ of habeas corpus. Proceeding in forma pauperis, appellant attacks only the life sentence imposed for the murder conviction. He contends that he was denied assistance of counsel in his interrogation by the police and that therefore the resulting confession was unconstitutionally admitted in evidence at his state trial. Applying the principles enunciated in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964),[1] we uphold Gillespie's contention and remand this case to the District Court for issuance of the writ.

The facts are not in dispute. Upon his arrest on a charge of maliciously wounding one Anna Dutton, appellant was subjected to eleven days of continual police interrogation concerning his possible involvement in the unsolved murder of Virginia Parkins. Clearly the focus of a police investigation, Gillespie persistently refused to admit complicity in the Parkins murder. At approximately 9:00 o'clock on the evening of appellant's tenth day in custody, the police began a session of intense interrogation which lasted until 3:00 o'clock the following morning, when Gillespie expressly demanded the assistance of counsel before submitting to further questioning. The session was then terminated, but was resumed that afternoon without any effort on the

[1] As appellant's trial took place on December 14, 1964, he properly relies only on the Supreme Court's opinion in *Escobedo.* See Johnson v. New Jersey, 384 U.S. 719 (1966).

part of the state to obtain the defendant an attorney in accordance with his request. Appellant repeated his desire for legal counsel and only then did one of the investigating officers summon a local attorney to the police station.

When, upon arrival at the station, the lawyer was informed of Gillespie's possible involvement in the "Parkins Matter," he told the suspect that a conflict of interests would prevent his serving as defense counsel. Appellant then inquired into the cost of retaining other counsel, to which the attorney responded that a lawyer's fee would be a minimum of $500. Before departing, however, the attorney did advise Gillespie of his right to remain silent. Ignoring this caution, appellant confessed shortly thereafter and his statement was ultimately admitted, over defense counsel's objection, at the state trial.

The state now concedes that the police procedure employed during Gillespie's interrogation fell short of *Escobedo* standards. As the Court stated:

> "We hold * * * that where * * * the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer * * * the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment * * * and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." 378 U.S. at 490.

Nevertheless, on this appeal the state urges us to accept the District Court's finding that appellant effectively waived his right to counsel. The record, however, does not support this conclusion.

Appellant unequivocally declared a desire to consult with an attorney before making a statement. The state disregarded this request and relentlessly pressed the interrogation. More importantly, after being rejected by state-chosen counsel the defendant was erroneously and improperly told that it would cost a minimum of $500 to exercise his right to counsel. Neither the police officers who were present during the lawyer's brief visit, nor anyone else, disabused the defendant, an indigent, of the effects of the misleading statement by advising him of his right to a free court-appointed lawyer. Since he was not fully and accurately apprised of his right, Gillespie could not knowingly and intelligently have waived it. *Fay* v. *Noia,* 372 U.S. 391 (1963); *Johnson* v. *Zerbst,* 304 U.S. 458 (1938). See also *United States* v. *Slaughter,* 366 F.2d 833 (4th Cir. 1966). Thus, the introduction of Gillespie's statement violated his Sixth and Fourteenth Amendment rights and rendered his conviction void.

We find it unnecessary in light of this conclusion to consider appellant's other contentions. The judgment of the District Court is reversed and the case remanded for the issuance of a writ of habeas corpus with leave to the state to retry petitioner if it be so advised.

Reversed and Remanded.